IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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D.B. CIVIL EXCISE APPEAL NO.10/2006

Union of India

Versus

M/s Rajasthan Udyog

Date of Order : 4.4.2006

PRESENT

HON'BLE MR.RAJESH BALIA, J.

HON'BLE MR. JUSTICE R.P. VYAS

Mr.V.K. Mathur, for the appellant.

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Heard the learned counsel for the appellant.

This appeal is directed against the order dtd.19.7.2004 passed by the Customs Excise and Service Tax Appellate Tribunal.

By the impugned order the Tribunal has deleted the penalty levied under Section 11 AC of the Central Excise Act, 1954 holding as under:

> "The appellants are not disputing their duty liability and we observe that even in January, 2000 when they had cleared the machines in CKD Condition they had paid an amount @10% of the price of the goods under the belief that they could send the same for the purpose of testing to their customers under Rule 57F(4) of the Central Excise Rules, 1944. They, after receipt of the goods from their customers, had again cleared the same on payment of appropirate duty. Thus, there has been only some delay in payment of duty on account of mistaken belief of the Appelalnts that the goods could be cleared for the purpose of testing without payment of full duty. It is not disputed that the entire duty has been paid by the Appellants at the time of removal of the goods in August, 2000. Larger Bebnch of the Tribnal has also held in the case of CCE, Delhi-III V/s Machine Montel (I) Ltd. - 20054 (160) ELT 464 (T-LB) that where duty amount has been paid by the assessee before issuance of the show cause notice, no penalty can be imposed under Section 11AC of the Central Excise Act. In the facts and circmstnaces of the present case, we hold that no penalty is imposable on any of the Appellants. We, therefore, set aside the penalties imposed on them."

The contentino of the appellant is that the Tribunal has erred in waiving and reducing the penalty as penalty leviable under Section 11AC is absolutely mandatory and does not leave any discretion with the assessing officer not to levy the penalty.

The question that has been suggested by the Revenue in this appeal reads as under:

> "Whether the learned Tribunal is right in law in setting aside the mandatory penalty imposed as

equal to the amount of duty, not paid during the period of delay, imposed under Section 11AC of the Act, 1944 on the assessee".

Having heard the learned counsel for the appellant and perused the order of penalty levied by the Commissioner as well as the order of the Tribunal, we are of the opinion that no substantial question of law arises in this appeal for consideration.

Section 11AC which enables the levy of penalty in reads as under:

"Penalty for short levy or non levy of duty in certain cases:- Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reasons of fraud, collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub Sec. (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined."

A perusal of the provisions shows that the condition of levy of penalty under Section 11AC is that where any duty of excise has not bene levied or paid or has been short levied or short paid or erroneously refunded **by reasons of fraud, collusion or any willful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty,** the person who is liable to pay duty as determined under sub Sec.(2) of Sec. 11A shall also be liable to pay a penalty equal to the duty so determined.

Thus, for levy of penalty, foundation is that a finding has to be reached that default in payment was a result of fraud, collusion or willful misstatement or suppression of fact or contravention of any provision of the Act with intent to evade payment of duty. Thus on account of statutory provision before levy of penalty finding of mens rea or guilty mind is a condition precedent. In the absence of such finding penalty under Section 11AC cannot be revived.

In the present case as we have noticed above, the finding of the Tribunal clearly goes to show that it cannot be said that it was a case of any fraud, collusion or any

willful misstatement or suppression of facts by the assessee nor it is contravention of any of the provisions of this Act with an intent to evade payment of duty in as much as the assessee has paid the full duty at the time of clearance of the goods. There was no intent to evade payment of duty. As a matter of fact, the Tribunal found that there has been only some delay in payment of duty on account of mistaken belief of the assessee that the goods could be cleared for the purpose of testing without payment of full duty. There is no intent to evade the payment of duty and therefore, it is not a case where penalty is a must. Obviously, it is not a case that penalty was imposable.

Consequently, the judgment of the Tribunal does not give rise to the question of law. The appeal therefore, fails and is hereby dismissed.

(R.P.VYAS),J. **(RAJESH BALIA)J.**
SS/-